Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PAO TATNEFT, :
:
Appellee, :
:
v. : No. 20-7091
:
UKRAINE, c/o MR. PAVLO :
PETRENKO, MINISTER OF :
JUSTICE, :
:
Appellant. :
:
- - - - - - - - - - - - - - - - - X

Friday, October 15, 2021

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE SRINIVASAN, CIRCUIT JUDGE HENDERSON, AND SENIOR CIRCUIT JUDGE EDWARDS

APPEARANCES:

ON BEHALF OF THE APPELLANT:

MARIA KOSTYTSKA, ESQ.

ON BEHALF OF THE APPELLEE:

MARK E. MCDONALD, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case No. 20-7091, Pao Tatneft versus Ukraine, care of Mr. Pavlo Petrenko, Minister of Justice, appellant. Ms. Kostytska for the appellant. Mr. McDonald for the appellee.

JUDGE SRINIVASAN: Good morning, counsel. Ms. Kostytska, please proceed when you're ready.

ORAL ARGUMENT OF MARIA KOSTYTSKA, ESQ.

ON BEHALF OF THE APPELLANT

MS. KOSTYTSKA: Good morning, Your Honors. May it please the Court. In the interest of time, I will address two grounds for appeal, illegality and forum non conveniens, and answer any questions you may have regarding the two other grounds, arbitrator bias and excess of subject-matter jurisdiction.

Illegality. The award that Tatneft seeks to enforce is based on illegality. Enforcement should be denied under Article V of the New York Convention, first, due to the limited scope of Ukraine's offer to arbitrate disputes relating to legal investments under Article V(1)(c) and, second, due to the American public policy against illegality under Article V(2)(b).

If the Court were to allow enforcement, it would lend its aid and reward illegality. The vast majority of Tatneft's claims is for the loss of its indirect

shareholding of Ukrtatnafta, a Ukrainian company. The indirect shareholding was acquired using promissory notes -- essentially, promises to pay. Ukrainian law prohibited capitalizing a company with promissory notes.

The public policy reasons behind the prohibition were similar to those of the D.C. Code, such as promissory notes often prove to be uncollectible; if promissory notes were counted part of the stated capital, shareholders and creditors would be misled or defrauded; and paying for shares with promissory notes dilutes the equity of the other shareholders; it also causes the company to forgo other sources of capital.

In this case, Amruz and Seagroup, foreign-incorporated shell companies with concealed beneficial ownership, squeezed their way into Ukrtatnafta to form a voting alliance with Tatneft, and these shell companies paid for their shares with promises to pay 65.8 million, and only 3 million were ever collected.

After the illegality of --

JUDGE SRINIVASAN: Excuse me one second. The implications of this argument, would it mean that any time, any time an award is thought to be in violation of foreign law, that it implicates the public policy exception?

MS. KOSTYTSKA: Your Honor, the illegality argument in this case implicates two provisions of the New

York Convention. The first one has to do with the scope of the offer to arbitrate, because the BIT between Russia and Ukraine specifically provides that disputes that can be arbitrated under BIT have to arise out of legal investments. So the legality requirement is encompassed in the BIT, which is part of the agreement to arbitrate and which define the scope of the offer to arbitrate.

And as far as the public policy exception is concerned under Article V(2)(b), not any illegality would implicate the public policy exception, but any illegality that is not trivial and that raises the type of concerns that I have just described would certainly come within the purview of the public policy exception, Your Honor.

In the district court proceeding, it was uncontested that disputes relating to illegal investments are outside the scope of the Ukraine's offer to arbitrate in the meaning of Article V(1)(c) of the New York Convention, and it was also undisputed that the United States has a public policy against illegality in the meaning of Article V(2)(b) of the New York Convention.

Tatneft did not even attempt to defend the legality of the share purchase using promissory notes in these proceedings; yet the district court did not evaluate Ukraine's concern with the illegality of the share purchase using promissory notes and did not draw Article V

consequences from it. The district court's order should be reversed, and enforcement should be denied for illegality under Article V.

Turning now to forum non conveniens, this case has no connection to the United States other than it being a contracting party to the New York Convention. The locus of the dispute is in Ukraine. The witnesses, experts, and assets are in Ukraine. The dispute involves complex issues of Ukrainian law and also Russian and Soviet law. Illegality of the share purchase is central to this dispute.

Tatneft has not identified any assets of --

JUDGE SRINIVASAN: We have some decisions that seem to stand for the proposition that forum non conveniens is not a basis on which there's relief in the context of a proceeding to enforce an arbitral award.

MS. KOSTYTSKA: Your Honor, let us look at the last footnote of the forum non conveniens section of TMR --

JUDGE SRINIVASAN: Right.

MS. KOSTYTSKA: -- if this is decision to which you refer --

JUDGE SRINIVASAN: Yes, TMR is --

MS. KOSTYTSKA: -- and --

JUDGE SRINIVASAN: -- and others, others that echo it.

MS. KOSTYTSKA: -- and the last footnote of the

TMR decision expressly carves out the question as to whether the forum non conveniens arguments are available or unavailable in New York Convention confirmation proceedings from its determination, and I read: Accordingly, we do not consider TMR's alternative contention that, contrary to the Second Circuit's decision in Monegasque v. Naftogaz of Ukraine, the doctrine has no place in an action to enforce an arbitral award.

So this particular question was specifically carved out from this Court's determination, and the (indiscernible) of Monegasque of the Second Circuit was undisturbed, and in that particular case, the Second Circuit specifically held that forum non conveniens is available as an argument in New York Convention proceedings, and why? Because Article V of the New York Convention sets forth the substantive defenses to confirmation. As Article --

JUDGE SRINIVASAN: On the subject of footnotes, I thought that there was a footnote in our Stileks decision that says -- I think relying on TMR -- that says that forum non conveniens is unavailable in the arbitral context.

MS. KOSTYTSKA: Your Honor, that footnote refers and relies to TMR, and we submit that that footnote is dictum, because by the time the Court got to that footnote, it already affirmed the confirmation of the award on two other grounds. The first one was the subject-matter

jurisdiction under the Foreign Sovereign Immunities Act, and the second one had to do with the pendency of some foreign proceedings. So after having affirmed the confirmation on those two grounds in the body, it got to this footnote. So we submit this is dictum, and so the only determination that perhaps requires clarification is --

JUDGE SRINIVASAN: Your audio is -- your audio is breaking up --

JUDGE EDWARDS: Your audio is breaking up, yes.

JUDGE SRINIVASAN: -- and when you, when you turn away, your audio is a little bit off. Sorry, it's --

MS. KOSTYTSKA: Yes. Your Honor, and I also would like to draw attention to Article III of the New York Convention, and this is the provision specifically that the Second Circuit interpreted. So while holding that the defenses in Article V are substantive matters, the forum non conveniens argument is procedural in nature, and Article III of the New York Convention specifically provides that enforcement has to be conducted and done in accordance with the procedures of the forum. So according to Article III of the New York Convention, the forum non conveniens argument remains available in New York Convention confirmation proceedings.

So, Your Honor, this case has no connection to the United States other than the United States being a

contracting party to the New York Convention. So why are we here today? Because of forum shopping. We submit that the reason why this Russian company, with close ties to the Republic of Tatarstan, a unit of the Russian Federation, dropped a jurisdictional hook in this district is to seek worldwide discovery into the assets of not only Ukraine but also numerous Ukrainian entities of strategic importance to the nation's welfare.

This Russian company is seeking to modelize far-reaching jurisdictional powers of American courts at times of geopolitical hostilities. This case should be dismissed for forum non conveniens, and I will discuss very, very briefly -- first, the district court erred in misconstruing the Court's precedent TMR to provide for a categorical rule that a foreign forum is always unavailable, inadequate in U.S. proceedings to enforce an arbitral award under the New York Convention; and second, such categorical reading of TMR would contravene Supreme Court precedent, particularly Piper and Sinochem.

With regard to the first point, TMR does not have such a categorical rule, it cannot be that a foreign forum is always inadequate and always unavailable in an action to confirm an arbitral award just because any such action can be characterized as an action to attach property in the United States, even where, as here, the judgment creditor

has (indiscernible) any property of Ukraine in the District and has openly admitted that it is unaware of any such property, and as we just discussed, such categorical reading of TMR would be contrary to the last footnote of the forum non conveniens section of that decision.

Turning now to the second point, such categorical reading of TMR would contravene Piper and Sinochem, the rule under Piper has always been and remains that an alternative forum can only be inadequate if the remedy that it provides is so clearly inadequate and unsatisfactory that it is no remedy at all, and the examples were that the defendant is not amenable to service of process or foreign law does not permit litigation of the subject matter of the dispute, and this is a very low standard of adequacy, easily satisfied here.

And second, I would like to turn to Sinochem, which was decided two years after TMR. It confirmed the continued vitality of the forum non conveniens doctrine because Sinochem was also an attachment case, and even though the attachment remedy was sought in that case, that did not preclude dismissal on forum non conveniens ground. Had attachment --

JUDGE SRINIVASAN: I think we have your Sinochem argument from the briefing, and I just want to make sure that my colleagues don't have additional questions --

JUDGE HENDERSON: No.

JUDGE SRINIVASAN: -- for you before we give Mr. McDonald a chance to respond.

JUDGE HENDERSON: No.

JUDGE EDWARDS: No.

JUDGE SRINIVASAN: Okay. Thank you, Ms. Kostytska. We'll give you a little time for rebuttal. Mr. McDonald, we'll hear from you now.

ORAL ARGUMENT OF MARK E. MCDONALD, ESQ.

ON BEHALF OF THE APPELLEE

MR. MCDONALD: Thank you, Your Honor. May it please the Court. I'm Mark McDonald for the appellee, Tatneft.

This case, there's a limited issue in front of the district court which is whether to recognize in the United States the final award which was rendered in France and upheld by the courts in France, and as this Court and others have recognized, the award debtor, Ukraine, in a case like this one, bears a very heavy burden to overcome the emphatic federal policy in favor of international arbitration awards and upholding our treaty obligations under the Convention.

The district court was absolutely correct to reject all of Ukraine's objections to enforcement of this award, even though they've been somewhat of a moving target in the four-plus years of this case, and all four of the

issues, including the two that counsel discussed just now that are raised on this appeal, are meritless, and the district court's final judgment affirming the award should be affirmed by this Court.

So I'll start with the illegality point which was raised. This is the issue of the way in which Amruz and Seagroup, which were not the claimants in the arbitration, but the way that those companies purchased their shares in the underlying company in the 1990s, and those shares were then purchased subsequently by Tatneft, the claimant in the arbitration.

Before the Court can even get to the merits of that issue, Ukraine actually waived this argument -- and not just once, but twice. The first time was in the arbitration itself, where Ukraine specifically requested that the arbitral tribunal address its own jurisdiction and it raised four separate jurisdictional arguments, including a very similar argument that Tatneft's own purchase of the shares in the company were outside of the Bilateral Investment Treaty, or the BIT, very similar argument to the argument that's being raised now with respect to the Amruz and Seagroup shares, but it never raised the argument that it's making to this Court today as an argument --

JUDGE SRINIVASAN: Insofar as that argument comes through the lens of the public policy issue, I'm not sure

that it's waivable, because that's not seeking to vindicate the interest of a particular party; that's seeking to vindicate the interest of the United States.

MR. MCDONALD: I agree with that, Your Honor. So the structure of Article V of the New York Convention is that Article V(1) are the defenses that have to be raised by the party resisting enforcement and then Article V(2), including the public policy exception, are sort of available to be recognized in court, if you will, and the public policy argument comes under that -- the latter of those two. But --

JUDGE SRINIVASAN: You're only talking about V(1)(c)? Is that your --

MR. MCDONALD: That's where I was starting, but I'm happy to talk about Article V(2)(b) --

JUDGE SRINIVASAN: No, no. I didn't realize which -- the same underlying factual --

MR. MCDONALD: It is.

JUDGE SRINIVASAN: -- the gravamen surfaces both under V(1)(c) and under public policy, and I just didn't know --

MR. MCDONALD: Yes.

JUDGE SRINIVASAN: -- which branch you were talking about.

MR. MCDONALD: Yes. Yes. That's a fair point,

Your Honor. So just -- okay, finish on V(1)(c), the waiver was clear in the tribunal -- in the arbitration itself. It, again, waived the argument in the district court because in July of 2017, when Tatneft had filed the petition in the district court, the district court ordered Ukraine to respond to that petition with its New York Convention defenses and it did so, raising the arbitrator bias point -- which is raised again on this appeal but wasn't discussed just now -- and a separate argument as to this allegation that Tatneft had acquired the Amruz and Seagroup shares from Amruz and Seagroup, who manufactured jurisdiction in the arbitration. That issue is separate from the illegality of Amruz and Seagroup's own purchase of the shares, but anyway, that issue has been abandoned on this appeal. It's not been raised.

Even if the issue had not been waived, under Article V(1)(c) it would be -- it would not succeed under this Court's precedents, including Chevron and more recently the Stileks decision that's been discussed today. Here, just as in both of those cases, the Bilateral Investment Treaty incorporated by reference the 1976 UNCITRAL Arbitration Rules, which this Court has found constitutes clear and unmistakable evidence that the parties delegated arbitrability questions to the arbitrators. Now, Ukraine made an argument in their brief that, well, that doesn't

matter because the arbitrators here didn't make a finding on the illegality points and so there's nothing to defer to, but with respect, that's because Ukraine, again, did not make this argument in the arbitration and never raised this issue as a jurisdictional defense in the arbitration.

And I would point the Court to language in the Stileks decision from earlier this year that when the parties delegate arbitrability issues to the arbitrators, it's not merely a cushion of deference, it's just that the court has actually no power to decide the arbitrability issues. That was a question, if it was going to be a question, for the arbitrators alone.

So turning, Your Honor, to V(2)(b) of the public policy aspect of this argument, the -- as this Court has said time and again, public policy is a very narrow exception to a New York Convention case seeking recognition of an arbitral award, and it simply does not encompass, however Ukraine wants to phrase it, you know, illegality under Ukrainian corporate law, the -- you know, obviously there's no public policy of the United States with respect to that, but okay, let's say, does the United States have a public policy with respect to the purchase of shares with promissory notes? Well, you know, maybe there was some sort of policy in the District of Columbia in the 1980s when the D.C. Code prohibited that type of purchase. Whatever that

policy reason was has since been abandoned because the Code has since been revised and now you can purchase shares in a company with promissory notes, but regardless, that's not the type of public policy that's so well-defined and dominant that it can overcome the recognition of a foreign arbitration award that's subject to the New York Convention. The only types of cases where that exception has been successfully invoked involved fraud or other very unique circumstances, and nothing like that has been alleged here.

And I would also note that the public policy exception is not an occasion for the district court or this Court to substitute its fact-finding for the arbitration -- for the arbitration tribunal's fact-finding. That was the holding of the Supreme Court of the United States in the United Paperworkers case.

So unless any of Your Honors has any questions on the illegality point, I'll turn to forum non conveniens, although I don't --

JUDGE EDWARDS: What do you -- what's your response on the V(1)(d), tribunal composition?

MR. MCDONALD: Sure, Your Honor. So --

JUDGE EDWARDS: What standard do you think the district court applied?

MR. MCDONALD: Well --

JUDGE EDWARDS: Did the district court apply

evident partiality, justifiable doubts, or something else?

MR. MCDONALD: I think, if you look at the district court's opinion, that it --

JUDGE EDWARDS: I did. I did.

MR. MCDONALD: -- actually reviews all three standards that have been suggested in this case and found that --

JUDGE EDWARDS: Do you think the district court said under justifiable doubts, I'm reaching the same conclusion?

MR. MCDONALD: I think the --

JUDGE EDWARDS: I mean, if you can point me to language, that's what I was trying to figure out, because it really is very unclear what standard the district court is applying. Now, if it's true that the district court said I'm reaching the same result with respect to all three, then of course I'd look at it that way, but I couldn't get myself there.

MR. MCDONALD: I think, I think you're right, Your Honor, that the -- that justifiable doubts standard comes from the UNCITRAL Rule --

JUDGE EDWARDS: Right.

MR. MCDONALD: -- and I don't -- I think the district court, her decision was that that cannot be the standard.

JUDGE EDWARDS: Do you agree with that?

MR. MCDONALD: I agree with it in the following sense. So in this -- this Court, in the Belize Bank case, found -- well, it said, right, that in an arbitrator bias case, as opposed to a question -- a case presenting a question as to how the arbitrators were selected, like, you know, maybe there would be an issue under V(1)(d) if --

JUDGE EDWARDS: But Belize dealt with the public policy defense.

MR. MCDONALD: I agree, but what the Court said was, in a case like this, where the allegation is that the arbitrators were bias, the only potential grounds under Article V was not V(1)(d) but V(2)(b), the public policy exception, and the reason that is, because this is not a question about how the tribunal was composed. There were rules, you know --

JUDGE EDWARDS: So wait. So then the district court -- you -- I think you're trying to dance away from it. I'd really like an answer -- the district court spent a number of paragraphs, as I remember, on this question and was talking about these different standards. I thought the correct answer would be that justifiable doubts is the correct standard, and I'm wondering if you think the district court applied that standard, and you -- your first dodge was to say, well, she applied everything. I'm not

sure that's right, and if she didn't apply justifiable doubts, can we reach that decision on our own or do we have to remand for determination on that?

MR. MCDONALD: I think, Your Honor, there's, there's no dispute of what the facts are, that this Court can decide it on its own if it thinks that that's the right standard. If I can just explain for a minute why I don't think that's the right standard. The combination of this Court's decision in Belize Bank and this Court's decision in the Republic of Argentina v. AWG, I think, explain this.

So in AWG, that case was a domestic arbitration case under Chapter 1 of the FAA. So the evident partiality standard applied. Now, interestingly, that case also involved an arbitration governed by the UNCITRAL Rules, but in that case this Court said, even in a Chapter 1 case, it's not the justifiable doubts standard under the UNCITRAL Rules that applies, it's the evident partiality standard under the FAA, because you don't just get to come into court, after you lose an arbitration, and say any sort of foot fault under the underlying arbitration rules gives me an excuse to undo --

JUDGE EDWARDS: I don't see how evident partiality can apply in a case with respect to an international issue.

MR. MCDONALD: I agree, and it certainly does not, and that was the point in the Belize Bank case, which is to

say that in a --

JUDGE HENDERSON: Right.

MR. MCDONALD: -- Chapter 2 case like this one, the evident partiality standard does not apply, and in fact --

JUDGE EDWARDS: Right.

MR. MCDONALD: -- the standard is even tougher because, because this is not a primary jurisdiction case where the Court has more latitude to undo an arbitration award. It, in fact, has less. And so if the -- if Ukraine's argument were accepted here, it would be backwards, right? You would be in an Article -- in a, sorry, in a Chapter 2 international arbitration award case. You would actually have more latitude to undo an arbitration for an allegation like this than you would in the Chapter 1 case, and that just can't be right.

JUDGE EDWARDS: Okay.

JUDGE SRINIVASAN: All right. Let me make sure my colleagues don't have additional questions for you, Mr. McDonald.

JUDGE HENDERSON: No.

JUDGE SRINIVASAN: Thank you --

MR. MCDONALD: Thank you.

JUDGE SRINIVASAN: -- Mr. McDonald. Ms. Kostytska, we'll give you two minutes for your rebuttal,

please.

ORAL REBUTTAL OF MARIA KOSTYTSKA, ESQ.

ON BEHALF OF THE APPELLANT

MS. KOSTYTSKA: Thank you, Your Honor. With regard to the waiver point, Ukraine does not waive its illegality argument by not raising it in the arbitration because it did in fact argue the illegality point during both the admissibility and jurisdictional phases of the arbitration. So even though the illegality argument was raised, it was not squarely addressed in the award on jurisdiction and admissibility.

And then most certainly, Ukraine raised illegality of the share purchase as a merits defense, and the tribunal did not address this issue and merely stated that a contrary view, that a share purchase with promissory notes be legal was tenable. So stating that something is tenable is not a determination. So this question was never resolved by the tribunal, even though this question was put before it.

And we also don't accept that we waived the illegality argument before the district court, because in the argument section of the opposition -- not just in the factual background section, in the argument section -- we stated, in Ukraine's submission, enforcement of the merits award would lend the court's power to wrongdoers Amruz and Seagroup, which unlawfully acquired their shares in

Ukrtatnafta by using promissory notes in violation of Ukrainian rule.

So this point was argued before the district court, and the district court could have and should have drawn Article V consequences from this argument, most certainly under the public policy exception, but if more clarity was necessary to brief this argument under the scope exception, then we requested supplemental briefing when additional Ukrainian law evidence became available in the UK proceeding. So had a fuller argumentation been helpful, we offered to provide it, and -- well, on this particular (indiscernible).

JUDGE SRINIVASAN: Okay.

MS. KOSTYTSKA: And opposing counsel raised the point with regard to -- Your Honor, I see that my time has expired. May I finish this one point?

JUDGE SRINIVASAN: Yes, you can finish this one point quickly. Thank you.

MS. KOSTYTSKA: Yes. So the last point is that we are not foreclosed by Chevron to raise this point, because Chevron does not allow to reargue admissibility -- arbitrability determinations that were actually decided by the tribunal and there is no authority that precludes you from looking at the points that have not actually been decided by the tribunal and --

JUDGE SRINIVASAN: Okay.

MS. KOSTYTSKA: -- there was no factual finding by the tribunal on this particular point and there is nothing to defer to, Your Honor.

JUDGE SRINIVASAN: Okay. Thank you, counsel. Thank you to both counsel. We'll take this case under submission.

(Whereupon, the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

_____ October 19, 2021

WENDY CAMPOS

DEPOSITION SERVICES, INC.